SUGUMAR BALAKRISHNAN

v.

DIRECTOR OF IMMIGRATION & ORS

HIGH COURT SABAH & SARAWAK, KOTA KINABALU
IAN HC CHIN J
[ORIGINATING MOTION NO: K. 25-29 OF 1997]
26 DECEMBER 1997

CONSTITUTIONAL LAW: *Fundamental liberties - Right to be heard - Whether applicant should be given opportunity to be heard - Whether reasons should be given for cancellation of entry permit - Whether there was violation of art. 5(1) or 8(1) of Constitution*

IMMIGRATION: *Cancellation of entry permit - Whether cancellation an error in law - Whether Director should have exercised power under s. 14 of Immigration Act 1959/63 ('the Act') - Whether operation of s. 14 should be subject to and in accordance with Chapter VII of Act*

ADMINISTRATIVE LAW: *Exercise of administrative powers - Judicial review - Whether act of director could be judicially reviewed - Whether act of director act of state authority - Whether challenge to act of director a challenge to state authority*

The respondents, pursuant to s. 65(1) of the Immigration Act 1959/63 ('the Act'), cancelled the applicant's entry permit which was granted to him in December 1995. The applicant applied for leave to file a motion for the order of *certiorari* and stay of the cancellation of the entry permit. Leave for the motion was granted but the stay was refused. On appeal to the Court of Appeal, the stay was allowed.

At the hearing of the motion, it was the submission of the respondents that the decision of the director and that of the state authority could not be judically reviewed on account of s. 59A (PartVI) of the Act. The applicant argued that the decision of the director should be quashed because the privative clause applied only to the acts of the state authority, which was the Chief Minister of Sabah ('the CM') as defined in the Act, s. 62. It was further contended that: (i) there was an error of law in cancelling the entry permit under s. 65 of the Act and not under s. 14 of the Act; (ii) the applicant had a legitimate expectation that the director would exercise his discretion under s. 14 of the Act according to the law; (iii) the applicant was entitled to procedural fairness which was the right to be heard (iv) no reasons were given for the cancellation and so the decision to cancel must be irrational.

Held:

[1] Section 62 of the Act defines state authority to mean not only the CM of the state but also 'such other person' as the CM may designate. In the instant case, the CM had designated the Secretary of Internal Affairs and Research and so he came within the meaning of state authority.

[2] A liberal approach to construction should be taken in order to implement the true intention of Parliament. When Parliament enacted s. 59A of the Act, it is clear that the intention of Parliament is to protect those acts or decisions of the state authority from judicial review. The act or decision of the director following a direction of the state authority is really the act or decision of the state authority as the director would have no choice but to carry out the direction. Therefore any challenge to the act of the director under s. 65 of the Act is in fact a challenge to the decision or act of the state authority and that is caught by the privative clause. The result is that the act or the decision of the director also enjoys the exclusion of the need to hear the applicant.

[3] The proviso in s. 64(1) of the Act provides that the operation of s. 14 of the Act shall be subject to and in accordance with chapter VII of the Act, which contains ss. 62 to 74. The effect is that s. 14 of the Act must be read subject to the right of the state authority to give direction to the director to cancel an entry permit. There is disharmony between s. 65 and s. 14 but since s. 14 had been brought in line with s. 65, s. 14 is to be moulded and read according to the provisions of s. 65 and other provisions of chapter VII.

[3a] The entry permit did not confer any permanent right on the applicant until after the expiration of two years from the date of the grant of the entry permit, and before that time, it was subject to cancellation at any time by the state authority under s. 65 of the Act. The amendment to s. 65 of the Act, did not change the nature of the right acquired by the applicant. It was still a right liable to be cancelled under s. 65, without the need to conduct any enquiry by the state authority or the director. Until the applicant had remained for two years and more after the grant of the entry permit, he was still an alien remaining in Sabah with the permission of the state authority with no substantive or vested right. Therefore there was no question of error of law, when the director followed the direction of the state authority to cancel the entry permit.

[4] The protection of the East Malaysian states must be interpreted to take into account and accord the affirmative actions validity. The exercise of the right to grant and to cancel an entry permit by a state authority is made unquestionable in a court of law and which Parliament had protected by enacting chapter VII of the Act.

[4a] The applicant according to the Act was a non-citizen, in so far as the state of Sabah was concerned. When he was granted the entry permit, there was in place the law, that it can be cancelled at any time by the state authority and the grant of the entry permit was subject to that provision of the law which allows for cancellation. Hence, if a cancellation did ensue, it was done in accordance with the law and not in violation of either art. 5(1) or 8(1) of the Constitution. Therefore there was no question of s. 59 of the Act being in violation of art. 5(1) or 8(1) of the Constitution.

[5] The case before the court was a case involving public policy because it involved the manner in which a state executive or the state authority went about overseeing immigration matters. It was unthinkable for the court to venture into making decisions as to when and whom should be issued an entry permit and to when and why an entry permit should be cancelled. Those were matters best left to the Executive. Since the director had acted in compliance with the direction of the state authority as required by s. 65 of the Act, there was no question of giving any reason because he had no choice of action. By virtue of ss. 59 and 59A of the Act, the director was not obliged to give any reason for the cancellation.

[Application dismissed; costs to Director and State Authority.]

Cases referred to:

Berthelsen v. Director General of Immigration Malaysia & Ors [1987] 1 MLJ 134 ***(refd)***

Chin Choy & Ors v. Collector of Stamp Duties [1979] 1 MLJ 69 ***(refd)***

Datuk Syed Kechik v. Government of Malaysia [1979] 2 MLJ 101 ***(refd)***

Dewan Undangan Negeri Kelantan & Anor v. Nordin bin Salleh & Anor [1992] 2 CLJ 1125 ***(refd)***

Foo Loke Ying & Anor v. Television Broadcasts Ltd & Ors [1985] 1 CLJ 511 ***(refd)***

Harris Solid State (M) Sdn Bhd & Ors v. Bruno Gentil s/o Pereira & Ors [1996] 4 CLJ 747 ***(refd)***

H Rubber Estates Bhd v. Director-General of Inland Revenue [1975] 1 MLJ 115 ***(refd)***

Kumpulan Perangsang Selangor Bhd v. Zaid bin Hj Mohd Noh [1997] 2 CLJ 11 ***(refd)***

Minister of Human Resources & Ors v. National Union of Hotel, Bar and Restaurant Workers, Semenanjung Malaysia and Anor Appeal [1997] 3 MLJ 377 ***(refd)***

Ng Hock Cheng v. Pengarah Am Penjara & Ors [1998] 1 CLJ 408 ***(refd)***
Petaling Tin Bhd v Lee Kian Chan [1994] 2 CLJ 346 ***(refd)***
R Rama Chandran v. The Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 ***(refd)***
Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union [1995] 2 CLJ 748 ***(refd)***
Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 2 CLJ 771 ***(refd)***
Yeo Peck Chie v. KS Gill 7 Co [1946] MLJ 131 ***(refd)***

Legislation referred to:
Federal Constitution, arts. 5(1), 8(1)
Immigration Ordinance 1959, s. 10
Immigration Act 1959/63, ss. 1(2), 14(4), 17, 59, 59A(2)(d), 59(B)(a), 62, 64(1), (3), 65(1)(c), (2), (3), 66(3), 71(1)(a), 74

For the applicant - Muhammd Shafee Abdullah (Sugumar Balakrishnan with him); M/s Sugumar & Co
For the 1st respondent - Nur Aini Zulkiflee, SFC
For the 2nd respondent - Stephen Foo (Athmat Hassan with him)

Reported by Anne Soh

JUDGMENT

Ian HC Chin J:

On 11 October 1997 Datuk Yong Teck Lee, presently the Chief Minister of Sabah, ('the Chief Minister') designated Datuk Ghulam Jelani bin Khanizaman, the Secretary of Internal Affairs and Research, ('Datuk Ghulam') under s. 62 of the Immigration Act 1959/63 ('the Act') for the purpose of issuing directions to the Director of Immigration, Sabah, under s. 65(1) of the Act. The Gazette notification published on 30 October 1997 relating thereto reads:

[No. JPBN, 1509/4/(88)]

THE IMMIGRATION ACT 1959/63
(ACT 155)

DESIGNATION UNDER SECTION 62

In exercise of the powers conferred upon me by section 62 of the Immigration Act 1959/63, I, Datuk Yong Teck Lee, the Chief Minister of Sabah, hereby designate Datuk Ghulam Jelani bin Khanizaman, Secretary of Internal Affairs and Research, for the purpose of issuing directions to the Director of Immigration, Sabah, under section 65(1) of the said Act.

2. This Notification shall come into operation on the date of its publication in the *Gazette*. Dated at Kota Kinabalu, this 11th day of October, 1997.

DATUK YONG TECK LEE,
Chief Minister Sabah

On 10 November 1997 Datuk Ghulam by a letter directed the director of immigration ('the director') to cancel the Entry Permit granted on 27 December 1995 to Sugumar Balakrishnan ('the applicant'). The letter is in these terms (reproducing only the relevant parts):

CHIEF MINISTER DEPARTMENT
Kota Kinabalu

10 hb. November, 1997

Pengarah Imigresen,
[Etc…]
KOTA KINABALU. (*U/P: Tuan Hj. Abdullah Sani Sulaiman)*

PEMBATALAN PERMIT MASUK TINGGAL
TETAP DI SABAH – ENCIK SUGUMAR BALAKRISHNAN
K/P NO. 4548121 (CIM/EP/21072)

Dengan hormatnya saya diarah merujuk kepada perkara tersebut di atas.

2. Adalah dimaklumkan bahawa menurut kuasa-kuasa yang diberi kepada Pihak Berkuasa Negeri oleh Seksyen 65(1) Akta Imigresen 1959/63 (Akta 155), saya selaku Pihak Berkuasa Negeri sebagaimana yang ditetapkan melalui G.N.S.2/97 bertarikh 30hb. Oktober, 1997, dengan ini memberi arahan menghendaki membatalkan Permit Masuk Tinggal Tetap di Sabah yang dikeluarkan kepada penama tersebut di atas.

3. Maka dengan ini adalah diharapkan pihak tuan dapat mengambil tindakan yang wajar untuk mematuhi arahan tersebut dengan serta merta.

4. Kerjasama tuan terhadap perkara ini adalah disudahi dengan ucapan terima kasih.

[Signed]

(DATUK GHULAM JELANI BIN KHANIZAMAN)
Pihak Berkuasa Negeri Sabah

The direction to the director was, according to that letter, given pursuant to the powers conferred under s 65(1) of the Act which is convenient to be set out here, viz.:

65. General powers of State authority.

(1) In exercising his powers under Parts I to VI as a special law for an East Malaysian State the Director shall comply with any directions given to him by the State authority, being directions:

(a) requiring him not to issue a Permit or Pass, or a specified description of Permit or Pass, to any specified person or class of persons, or to do so only for a specified period or on specified terms and conditions;

(b) restricting the making of endorsements on a Permit, Pass or Certificate; or

(c) requiring him to cancel any Permit, Pass or Certificate issued to a specified person, or to deem a specified person to be an undesirable immigrant, or to declare that a specified person's presence in the East Malaysian State is unlawful, or to order a specified person's removal from the State.

(2) Where the Director takes any action in obedience or purported obedience to any directions given under subsection (1), and there is an appeal to the Minister against that action, the Minister shall not allow the appeal without the concurrence of the State authority.

(3) An order under section 55 shall not have effect as a special law for an East Malaysian State, except so far as its provisions are by the same or a subsequent order applied to those purposes with the concurrence of the State authority.

The director carried out the direction on 12 November 1997 when he caused the applicant to be served with a notice containing the following terms:

NOTICE OF CANCELLATION OF ENTRY PERMIT
Section 65(1)(c) Immigration Act 1959/63
(Amended 1997)

To: Sugumar Balakrishnan of Kota Kinabalu

Whereas you, Sugumar Balakrishnan I/C No. 4548121, has been granted entry permit to reside in Sabah vide Ref. No. CIM/EP/21072 issued on 27 December 1995 at Kota Kinabalu.

NOW, KNOW YOU, That I, Abdullah Sani Bin Sulaiman, State Director of Immigration, Sabah by virtue of the directive by the State Authority of Sabah under section 65(1)(c) of the Immigration Act, 1959/63 do hereby forthwith cancel the entry permit issued to you and your presence in the state of Sabah is declared unlawful.

Upon receiving this order you are summoned to appear at the Immigration Office 6th floor, Wisma Dang Bandung, Kota Kinabalu, Sabah on or before 18 November 1997 for further action.

[Signed]
(ABDULLAH SANI SULAIMAN)
DIRECTOR OF IMMIGRATION
STATE OF SABAH

Dated this: 11 November 1997

The applicant was also at the same time served with a copy of a special pass that allowed him to remain in Sabah for seven days in order to enable him to appear before the director on or before 18 November 1997.

The applicant on 17 November 1997 moved the High Court and obtained leave to apply for an order of *certiorari* but failed to obtain a stay of the cancellation of the entry permit. The stay was, however, granted by the Court of Appeal. The motion for the order of *certiorari* was then filed on 20 November 1997 and the State Authority of Sabah then joined the proceedings on 18 December 1997. The motion was thereafter heard on December 19 and 20 and I reserved judgment till 26 December 1997.

Other Facts Of Case

The applicant is a Negri Sembilan-born Malaysian who first came to Sabah on 8 August 1975 to work as a teacher. He later became an advocate after being admitted to the Sabah Bar on 23 October 1985 and had since practised as an advocate in Sabah until now, at first under a work pass. He has five children from his marriages and had made Sabah his home. He had bought six properties in Kota Kinabalu. Sometime in 1995 he applied for an entry permit but it was rejected on 8 August 1995. On 21 December 1995 he personally handed an appeal letter to the then Chief Minister of Sabah, Datuk Salleh Tun Said Keruak, who noted on the letter that he has no objection to the application for the entry permit. This letter was then handed to the director on 22 December 1995 and it resulted in a letter dated 26 December 1995 from the director to the applicant to notify him the approval of the entry permit. On 27 December 1995 the applicant's passport was endorsed with the entry permit.

Mr. Muhammad Shafee Abdullah, learned counsel for the applicant, had argued that the decision of the director ought to be quashed while Datuk Stephen Foo, the learned Sabah State Attorney-General, who appeared for the State Authority of Sabah, argued otherwise. Ms. Nur Aini binti Zulkiflee, the learned senior

federal counsel, appeared for the director, but she did not argue against or for any party. I turn now to the various contentions, several of which revolve around the construction of the various provisions of the Act.

Contentions

Whether Judicial Review Excluded?

Datuk Foo contended that the decision of the director and that of the State Authority cannot be judicially reviewed on account of s. 59A (Part VI) of the Act which came into force on 1 February 1997. That section reads:

> Exclusion of judicial review.
>
> 59A (1) There shall be no judicial review in any court of any act done or any decision made by the Minister or the Director General, or in the case of an East Malaysian State, the State Authority, under this Act except in regard to any question relating to compliance with any procedural requirement of this Act or the regulations governing that act or decision.
>
> (2) In this section, "judicial review" includes proceedings instituted by way of –
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> (a) an application for any of the prerogative orders of *mandamus,* prohibition and *certiorari*;
>
> (b) an application for a declaration or an injunction;
>
> (c) any writ of *habeous corpus*; or
>
> (d) any other suit or action relating to or arising out of any action done or any decision made in pursuance of any power conferred upon the Minister or the Director-General, or in the case of an East Malaysian State, the State Authority, by any provisions of this Act.

Mr. Shafee, however, submitted that the privative clause applies only to acts or decisions of the State Authority and that is the Chief Minister of Sabah as defined in s. 62 of the Act and that it does not apply to any act or decision of the director. This calls for an examination of that definition section the relevant part of which is in the following terms:

PART VII
SPECIAL PROVISIONS FOR EAST MALAYSIS

Chapter 1 – General

62. Interpretation

In this part unless the context otherwise requires
…

"State Authority", for any purpose relating to an East Malaysian State, means the Chief Minister of the State or such person holding office in the State as the Chief Minister may designate for the purpose by notification in the State *Gazette*.

It is clear to me, and therefore, Datuk Foo was correct in submitting that s. 62, *supra*, does not have the effect urged by Mr. Shafee because "State Authority" had been defined to mean not only the Chief Minister of the State but also "such other person" as the Chief Minister may designate. Therefore, the term "State Authority" means either the person who is then the Chief Minister of Sabah or someone (holding office in the state) whom the Chief Minister had designated. The Chief Minister, it will be recalled, as designated Datuk Ghulam.

Mr. Shafee next argued that s. 59A does not apply to the director because the term "director general" used in s. 59A is not intended to include the director "in so far as his duty to comply with directions given by the State Authority under s. 65" is concerned. This is how learned counsel submitted:

The word "Director General" in Section 59A is not intended to include the [Director] in so far as his duty to comply with directions given by the State Authority under Section 65. By virtue of Section 59B(a) read together with Section 64(3), the duty to comply with directions given by the State Authority under Section 65 is not a duty required to be discharged by the Director General under Parts I to VI of the Immigration Act 1959/63. It is a duty to be discharged by the [Director] under Section 65(1). Therefore, when the [Director] cancelled the entry permit and made the declaration pursuant to compliance with the direction given by the State Authority under Section 65(1)(c) and the Director General did not have a corresponding duty in this connection under Parts I to VI.

Learned counsel added that what he submitted (1) reflects the clear intention of Parliament since it made separate provision for the East Malaysian state, (2) is supported by the clear words of s. 59A and (3) is supported by the fact that the Act, which is a penal statute, should be construed narrowly in

favour of the applicant and also when there is doubt. Since ss. 64 and 65 (Part VII) are mentioned in support of the argument it is convenient that they also be reproduced, *viz.*:

64 (1) Without prejudice to the general operation of Parts I to VI (in East Malaysia as in West Malaysia), as a general law for Malaysia as a whole, those Parts shall also have effect, subject to and in accordance with this Chapter, as a special law for each of the East Malaysian States as if for any reference to Malaysia (except in a reference to a Government in Malaysia) there were substituted a reference to the East Malaysian State.

(2) Regulations under section 54 and orders under section 55 (exemption), may make special provision as regards an East Malaysian State for the purpose of Parts I to VI as a special law for that State; and no such regulations shall be made or have effect so as to prejudice the powers conferred by this Chapter on the authorities of the State.

(3) There shall be a Director for each of the East Malaysian States who, subject to section 3(2) and 4, shall have all such authority to exercise the powers and discretions vested in the Director General by Parts I to VI, and discharge the duties required to be discharged by him, as may be necessary for the purpose of giving effect to those Parts as a special law for the State.

(4) In the operations of Parts I to VI as a special law for an East Malaysian State, those Parts shall have effect subject to the following modifications:

(a) section 9A (which confers on the Director General a general power to limit entry into Malaysia) and section 46 (which relates to repatriation) shall not apply; and

(b) references to a Permit or Pass shall mean a Permit or Pass to enter the East Malaysian State.

(5) Notwithstanding anything in subsections (1) to (4), the powers and discretions vested in the Director by Parts I to VI, as a special law for an East Malaysian State shall not be exercised by him so as to exclude or remove from the East Malaysian State, a person entitled to be in Malaysia outside East Malaysia, except with a view to making effective the powers conferred by this Chapter on the authorities of the State; and no such person shall in the exercise of those powers be required to leave and depart from Malaysia nor, without his consent, be removed from Malaysia.

65(1) In exercising his powers under Parts I to VI as a special law for an East Malaysian State the Director shall comply with any directions given to him by the State authority, being directions

(a) requiring him not to issue a Permit or Pass, or a specified description of Permit or Pass, to any specified person or class of persons, or to do so only for a specified period or on specified terms and conditions;

(b) restricting the making of endorsements on a Permit, Pass or Certificate; or

(c) requiring him to cancel any Permit, Pass or Certificate issued to a specified person, or to deem a specified person to be an undesirable immigrant, or to declare that a specified person's presence in the East Malaysian State is unlawful, or to order a specified person's removal from the State.

(2) Where the Director takes any action on obedience or purported obedience to any directions given under subsection (1), and there is an appeal to the Minister against that action, the Minister shall not allow the appeal without the concurrence of the State authority.

(3) An order under section 55 shall not have the effect as a special law for an East Malaysian State, except in so far as its provisions are by the same or subsequent order applied to those purposes with the concurrence of the State authority.

Datuk Foo replied that the term "director general" in s. 59A covers the director "by virtue of s. 64(3)" and that when the director exercised his power to comply with the direction of the State authority, he was in fact exercising a general power under Parts I to VI to give effect to specific direction under s. 65. That proposition of law appears to be against the cardinal rule that the literal meaning of the words must be adhered to as closely as possible (*Yeo Peck Chie v. K.S. Gill 7 Co.* [1946] MLJ 131, 133; *H Rubber Estates Bhd v. Director-General of Inland Revenue* [1975] 1 MLJ 115; *Chin Choy & Ors v. Collector of Stamp Duties* [1979] 1 MLJ 69; *Foo Loke Ying & Anor v. Television Broadcasts Ltd & Ors* [1985] 2 MLJ 35). However, there is a presumption against Parliament acting in vain (*Foo Loke Ying & Anor v. Television Broadcasts Ltd & Ors*). It is clear to me that parliament had intended that certain decisions and orders of the executive ought not to be questioned by the court when it introduced the privative clause, at first in 1989 but amended to its present form in 1997. The clause seeks to protect the act or decision of, among others, the state authority. What, then, are the acts or decisions which a State authority can make under the Act? They appear to me to those acts or decisions of the state authority when giving directions pursuant to s. 65. The directions are the only decisions or acts which a State authority make under the Act. Therefore, when Parliament enacted s. 59A, it is clear that the intention of Parliament was to protect those acts or decisions

of the State authority from judicial review (except for questions relating to compliance with procedural requirement of the Act or regulations governing those acts or decisions). The act or decision of the director following a direction of the State authority is really the act or decision of the State authority as the director has no choice but to carry out the direction. Therefore, any challenge to the act of the director under s. 65 is in fact a challenge to the decision or act of the State authority and that is caught by the privative clause. To construe the privative clause as not to apply to the director would expose the act or decision of the State authority to judicial review which is what Parliament had sought to prevent and this would mean Parliament had acted in vain. This should be avoided. A liberal approach to construction must be taken in order to implement the true intention of Parliament (*Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261). Furthermore, I am of the view that s. 59A2(d) can be used in aid of the above conclusion because it defines judicial review to include "any other suit or action relating to or arising out of any act done or any decision made in pursuance of any power conferred upon ... the state authority by any provisions of this Act". This means judicial review is excluded if whatever the director did was pursuant to a decision or act of the state authority under the provisions of the Act. Therefore, it makes sense if the action of the director is equated with the act or decision of the state authority.

Mr. Shafee then argued that the applicant's challenge comes within the excepting provision. No procedure is laid down for the State authority to observe before it issues any direction under s. 65. There is no procedure laid down for the director to observe before complying with the direction and before cancelling the entry permit under s. 65. The requirement of s. 14 of an inquiry does not, for the reasons appearing later, apply to Part VII.

It was then argued that there is an error of law when the director cancelled the entry permit and made the declaration of unlawfulness and that such a decision would not be immunized from judicial review by an ouster clause, citing in support *Petaling Tin Bhd v. Lee Kian Chan* [1994] 1 MLJ 657 SC, *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers Union* [1995] 2 MLJ 317 CA and *Kumpulan Perangsang Selangor Bhd v. Zaid Bin Hj Mohd Noh* [1997] 1 MLJ 789 SC. As a matter of law, it is settled by the cases cited that where there is an error of law a privative clause will not prevent judicial review. But the question is – did the director or the state authority commit any error of law?

Whether There Is An Error Of Law?

It will recalled that the director acted to cancel the entry pass after he was directed to do so by the state authority under s. 65. Mr. Shafee contended that the director can only cancel the entry permit under s. 14 and can only make the declaration under s. 14(4) and since the director acted, instead, under s. 65, he had committed an error of law. Instead of summarising what Mr. Shafee had said in this regard, it is best that I reproduce what learned counsel had submitted in full, viz.:

> 14. The central issue here is whether the Respondent could cancel the Applicant's Entry Permit and make the declaration under Section 65(1)(c) without exercising his powers under Section 14 and without reference to Section 14.
>
> 15. Prior to 1st February 1997, Section 65(1)(c) read as follows:
>
> In exercising his powers under Parts I to VI as a special law for an East Malaysian State the Director shall comply with any directions given to him by the State authority, being directions
>
> (c) requiring him to exercise his discretion vested in him to cancel any Permit, Pass or Certificate issued to a specified person, or to deem a specified person to be an undesirable immigrant, or to declare that a specified person's presence in the East Malaysian State is unlawful, or to order a specified person's removal from the State.
>
> 16. Section 65(1)(c) was amended pursuant to Immigration (Amendment) Act 1997, which came into force on 1st February 1997, wherein the words "exercise any discretion vested in him to" was deleted. However, it is pertinent to note that the words "In exercising his powers under Parts I to VI as a special law for an East Malaysian State..." has not been deleted.
>
> 17. Part III of the Immigration Act 1959/63. comprising Sections 10 to 15, deals specifically with Entry Permits: generalia specialibus non derogant rule applies. The Applicant was granted an Entry Permit pursuant to Section 10 of the Act (see the endorsement in the Applicant's Passport at exhibit "SB-9" in the Applicant's Affidavit).
>
> 18. Part VII of the Immigration Act 1959/63 comprise of special provisions for East Malaysia. Section 64(1) makes it amply clear that Parts 1 to VI is the Immigration law applicable to Malaysia and "those Parts shall also have effect ... as a special law for each of the East Malaysian States ...". Section 64 (3) clearly states that the Respondent shall have all such authority to exercise the powers and discretions vested in the Director General and to discharge the duties required to be discharged by him as may be necessary for the purpose of giving effect to Parts I to V1 of the Immigration Act 1959/63 as a special law for an East Malaysian State.

19. It is an undisputed fact that the Director General has no powers or discretion vested in him as far as Part VII of the Immigration Act 1959/63 is concerned. It ought to be noted that the Respondent, when he cancelled the Entry Permit and made the declaration, was exercising powers vested in the Director General under Part III of the Immigration Act 1959/63.

20. It is submitted that the Respondent has no independent power vested in him under Section 65 to cancel the Entry Permit and make the declaration. This is clearly amplified by the words "In exercising his powers under Parts I to VI as a special law for an East Malaysian State the Director shall ... " The Respondent's power in this case emanates from Parts I to VI and this is made clear by Sections 64 and 65 of the Immigration Act 1959/63. Submit that the words of Sections 64 and 65 clearly reflects the object and intention of Parliament. Since Sections 64 and 65 regulates the exercise of the Respondent's powers *vis-a-vis* Parts 1 to VI, it must be strictly and meticulously followed: *Majlis Peguam Malaysia & Ors v. Au Kong Weng Joseph* [supra]

21. The Applicant is a West Malaysian. The Federal Court in *Datuk Syed Kechik v. Government of Malaysia [supra]* had to determine, *inter alia,* whether a West Malaysian's Entry Permit may lawfully be cancelled. At the time when the Federal Court decided Datuk Syed Kechik's case. The provisions of Section 65 was in existence in the form prior to its amendment on 1st February 1997. Lee Hun Hoe C.J. (Borneo) (as he then was) alluded to it when he said at page 108 "As the Director may have to act on the direction of the State Authority in cancelling the entry permit ...".

22. The Federal Court in *Datuk Syed Kechik v. Government of Malaysia* [supra] held that **"the Entry Permit may lawfully be cancelled under Section 14 of the Act"**. Suffian LP (as he then was) had this to say:-

> A West Malaysian like the applicant requires an Entry Permit to enter Sabah, section 64(4)(b). This he has. Such an Entry Permit is issued by the Director of Immigration for Sabah, subsection (3) of section 64. The Director is expressly given power to cancel the Permit in the following circumstances:
>
> (1) if the holder seeks to enter Sabah accompanied by a child whose name is not endorsed on the Permit and who is not otherwise entitled to enter Sabah, section 14(1);
>
> (2) if the Director is satisfied that the Permit was issued as a result of any false representation or concealment of a material fact, section 14(2);

(3) if the Director is satisfied that the holder is a prohibited immigrant, section 14(3).

23. While the 1997 amendment deleted the words exercise any discretion vested in him to", Section 65(1) retained the words **"In exercising his powers under Parts I to VI as a special law for an East Malaysian State ...".** Submit that this means the Respondent must exercise his powers under Section 14 according to law notwithstanding the direction from the State Authority. In the present case, the Respondent failed to do so. If he had done so, it is submitted that he would have come to the one and only conclusion that there was no material before him to satisfy the factual conditions precedent set out in Section 14 (l), (2) and (3). Similarly, he would also have come to the conclusion that there was no material before him to satisfy the factual conditions precedent set out in Section 14 (4) to make the declaration.

24. Submit that 5 rules and maxims of interpretation would have to be considered here, namely, (a) statutes to be construed within its context (b) Parliament will not depart from the general system of law (c) Parliament will not waste its words or say anything in vain (d) the rule of harmonious interpretation and (e) statutes cannot take away rights retrospectively.

25. The Respondent had read the provisions of Section 65 in isolation when he should have looked at the Act as a whole. Edgar Joseph Jr SCJ in *Chor Phaik Har v. Farlim Properties Sdn Bhd* [1994] 3 MLJ 345 (FC) had this to say:

> (T)he words of the proviso must be read in their context. By this is meant, we must not only read the words of the proviso in the light of s. 322 as a whole but also in the light of the Code as a whole ... in interpreting a statute. What the court is endeavouring to do is to give effect to the object and intent of Parliament in enacting that statute ...

26. Edgar Joseph Jr SCJ in *Coramas Sdn Bhd v. Rakyat First Merchant Bankers Bhd & Anor* [1994] 1 MLJ 369 (SC) said that:

> The issue ... appeared to us to be purely and simply one of construction, and in the ultimate resort must be determined upon the actual words used in [the relevant provisions] ... read not in vacuo but as occurring in a single complex statute, in which one part may throw light upon another.

27. In amending Section 65 in 1997 why did Parliament retain the words "In exercising his powers under Parts I to VI as a special law for an East Malaysian State..."? Section 64 must also be considered since it makes it clear that the Respondent in Part VII of the Act was applying the general operation of Parts 1 to VI as a special law for Sabah. Submit Parts 1 to VI represents the general system of law.

28. Peh Swee Chin SCJ in *Chan Chin Min & Anor v. Lim Yok Eng* [1994] 3 MLJ 233 (SC) said:

> There is one important principle of statutory interpretation which has been applied repeatedly over the years. It is this, that it is in the highest degree improbable that Parliament would depart from the general system of law without expressing its intention with irresistable clearness. I find such clearness missing ... I would agree also 'that interpretation should be chosen which involves the least alteration of existing law'....

29. There must be a valid reason why Parliament had retained the words "In exercising his powers under Parts I to VI as a special law for an East Malaysian State..." when Section 65 (1)(c) was amended in 1997. Effect must be given to all the words in a statute because the legislature is deem not to waste its words or that it will say anything in vain. Abdoolcader SCJ in *Foo Loke Ying & Anor v. Television Broadcasts Ltd & Ors [supra]* said that:

> The court ... is not at liberty to treat words in a statute as mere tautology or surplusage unless they are wholly meaningless. On the presumption that Parliament does nothing in vain, the court must endeavour to give significance to every word of an enactment, and it is presumed that if a word or phrase appears in a statute, it was put there for a purpose and must not be disregarded ...

30. Section 65(1)(c) must be read in the light of Part III of the Act which deals specifically with Entry Permits to ensure a harmonious interpretation: *Chiu Wing Wa & Ors v. Ong Beng Cheng* [1994] 1 MLJ 89 (SC) and *Soon Kong Meng & Anor v. Lee Thye & Ors* [1995] 3 MLJ 544 (FC).

31 To say that the Respondent can cancel the Entry Permit and make the declaration under Section 65 (1) (c) independent of Section 14 would lead to an absurd result in the light of the words In exercising his powers under Parts I to VI as a special law for an East Malaysian State ... Submit that the correct approach would be to apply the purposive rule: *Lia Phin Khian v. Kho Su Ming* [1966] 1 MLJ 1 (FC).

32. The Applicant was granted his entry permit on 27th December 1995 and at this stage the Applicant had a substantive or vested right that in the event of the State Authority giving a direction to the Respondent under Section 65 (1) (c) the Respondent would exercise his discretion or power under Section 14 according to law. Certainly, the Applicant had a legitimate expectation that in such an event the Respondent would exercise his discretion or power under Section 14 according to law.

33. There is so express provision to the effect that the amendment to Section 65(1)(c) has retrospective effect.

34. The 1st February 1997 amendment purported to impair the existing right of the applicant and inflict a detriment to it as it takes away vested right and/or legitimate expection under the existing law. Submit, that in these circumstances the 1997 amendment has no restospective effect unless clearly indicated in the statute itself. *National Land Finance Co-operative Society Ltd v. Director General of Inland Revenue* [1994] 1 MLJ 99 (SC), *Lim Phin Khian v. Kho Su Ming [supra] and Sio Seoh Beng & Anor v. Koperasi Tunas Muda Sungai Ara Bhd.* [1995] 1 MLJ

35. As indicated in paragraph 7 (g) and (h) hereof, the Immigration Act 1959/63 is a penal statute. Submit that this statute has to be strictly construed. If the amendment to Section 65(1)(c) has created any ambiguity or doubt as to whether that amendment has taken away the Respondent's discretion or power under Section 14, that ambiguity or doubt ought to be resolved in favour of the Applicant. Reference is made to the authorities cited in paragraph 7(h) hereof.

36. One more matter needs to be considered here. Did the Respondent make the declaration that the Applicant's presence in the State of Sabah is unlawful pursuant to the State Authority's directive. Section 65(1)(c) allows the State Authority to direct the Respondent "... to declare that a specified person's presence in the East Malaysian State is unlawful ...'

37. However, the State Authority's directive (exhibit "ASS-1" in the Affidavit In Reply of Abdullah Sani Bin Sulaiman sworn on 11.12.97) gives only one directive, namely, "...dengan ini memberi arahan menghendaki tuan untuk membatalkan Permit Masuk Tinggal Tetap di Sabah yang dikeluarkan kepada penama tersebut diatas".

38. However, the Respondent in his "Notice of Cancellation of Entry Permit" dated 11.11.97 proceeds to tell the Applicant "...and your presence in the State of Sabah is declared unlawful". What then was the basis for the Respondent to make the declaration when there was no directive from the State Authority to do so? It is pertinent to note that the Respondent in his Affidavit In Reply sworn on 11.12.97 has not at all touched on the subject of him making the declaration against the Applicant.

39. In the light of the matters stated in paragraphs 11 to 38 hereof, it is submitted that the Respondent can only lawfully cancel the Applicant's Entry Permit and make the declaration in accordance with the provisions of Section 14 of the Immigration Act 1959/63. However, in the Applicant's case the Respondent had:

    (a) failed to comply with the statutory requirements set out in Section 14 before cancelling the Applicant's Entry Permit and making the declaration and therefore the cancellation and declaration constituted an error of law which the Respondent had no jurisdiction to make;

(b) misdirected himself in law and in fact when he did not apply his mind to Section 14;

(c) not exercised his discretion under Section 14;

(d) misdirected himself in law and in fact when he failed to consider that the circumstances stated in Section 14 (1), (2), (3) and (4) did not exist at all to justify the exercise of the Respondent's discretion to cancel the Applicant's Entry Permit and to make the said declaration and the Respondent had thereby committed 'Anisminic error;'

(e) acted under dictation and mechanically and had thereby fettered his discretion; and

(f) failed to take into account relevant considerations. Namely, that the circumstances stated in Section 14 (1), (2), (3) and (4) did not exist at any material time.

The thrust of that argument of Mr. Shafee is that the director was in fact exercising his powers under s. 14 to cancel the entry permit and to declare the presence of the applicant in Sabah unlawful even though he acted under s. 65 after being directed by the State authority. This is clear, according to learned counsel, from the fact that Parliament when it amended s. 65 had retained the words "In exercising his powers under Parts I to VI as a special law for an East Malaysian state". That argument appears at first glance attractive if not for the fact that learned counsel made no mention of the proviso in s. 64(1) that the operation of s. 14 shall be "subject to and in accordance with Chapter VII which contains ss. 62 to 74. The effect of that provision is that s. 14 must be read subject to whatever has been provided in ss. 62 to 74 of Part VII. Whatever doubt there may be would surely be put to rest if s. 1(2) is taken into account. That section says: This Act applies throughout Malaysia subject to Part VII."

This leads me to the question of whether the provision of s. 14 had in anyway been modified or changed by s. 65 to which it is subject to. Section 14 reads like this:

Cancellation of, and declarations regarding, Permits and Certificates

14(1) Where the holder of any Permit seeks to enter Malaysia accompanied by any child whose name is not endorsed upon the Permit under section 12 and who is not otherwise entitled to enter Malaysia under this Act, the Director General may cancel the Permit issued to that person.

(2) Where, upon the arrival in Malaysia of any person to whom a Permit or Certificate has been issued, the Director General is satisfied, as a result of inquiries made under section 24 or 26, or from other information, that the

Permit or Certificate was issued as a result of any false representation or concealment of a material fact the Director General may cancel the Permit or Certificate.

(3) Where at any time, during the period of validity of any Permit or Certificate, the Director General is satisfied that the holder of the Permit or Certificate is a prohibited immigrant the Director General shall cancel the Permit or Certificate.

(4) Where any person has entered Malaysia by virtue of a Permit or Certificate, and the Director General is satisfied

(a) that any material statement made in or in connection with the application for that Permit or Certificate was false or misleading; or

(b) that the person is a prohibited immigrant, the Director General may declare at any time after the date of the entry, that the presence of that person in Malaysia is unlawful.

(5) On making any cancellation under subsection (2) or (3) or on making any declaration under subsection (4) the Director General shall, by notification, which, if the address of the person is known shall be sent to him at that address and otherwise shall be published in such manner as the Director General deems fit, inform the person affected thereby of the grounds on which the cancellation or declaration has been made and the person may appeal against the cancellation or declaration, as the case may be, within such time and in such manner as may be prescribed, to the Minister, whose decision shall be final.

If one is to take the argument of Mr. Shafee to its logical conclusion it would mean that if the director does not move to cancel any Entry Permit the State authority cannot initiate that action. Was this the intention of Parliament? The history of the Act has to be gone into to see why the Act had undergone the various amendments.

Prior to Sabah and Sarawak joining Malaysia, there was the Immigration Ordinance 1959 in Malaya. At the formation of Malaysia, the Immigration Act of 1963 (Act 27 of 1963) was passed. The 1963 Act repealed the Sabah Immigration Ordinance of 1962 and extended the Immigration Ordinance 1959 of Malaya to Sabah. In addition it enacted the special provisions in Part II for the Borneo states. Section 1 of the 1963 Act provided that it shall be construed as one with the Immigration Ordinance 1959. Thereafter the 1963 Act and the Immigration Ordinance 1959, were referred to as Immigration Act 1959/63. In 1975, the Immigration Ordinance 1959 and Immigration Act of 1963 were superseded by the Immigration Act 1959/63 (Revised-1975). Part II (which contained special provisions for Sabah and Sarawak) of Immigration Act of 1963 is now Part VII of the Revised Act. The Act is a consolidation

of the Immigration Ordinance 1959 ('the 1959 Ord.') and the Immigration Act 1963 ('1963 Act'). The 1963 Act was passed upon the formation of Malaysia in 1963 to give special protection to Sabah and Sarawak on immigration matters. This protection was a pre-requisite for the formation of Malaysia as evidenced by the Malaysia Agreement. This special protection had been entrenched by art. 161E(2) which prevents amendment to such matters as covered by the special protection without the concurrence of, in the case of Sabah, His Excellency, the Yang di-Pertua Negeri of Sabah. Section 14 relating to the cancellation of entry permit provides for only the director general to act and for an appeal against his decision to the Minister. Section 64(3) made provision for a director for each of the East Malaysian states and for them to exercise the powers exercisable by the director general. This is one of the modifications to be taken into account when applying s. 14 to Sabah. Another modification is that the director must comply with the direction of the State authority that requires him to cancel an entry permit. Pausing here, it is pertinent to ask whether Parliament intended that the director should conduct the enquiries provided under s. 14 before he complies with the direction? Another pertinent question is does Parliament intend to allow the director to defy the direction if after enquiries he somehow forms the view that the entry permit should not be cancelled? Before answering those questions, it must be borne in mind firstly that Sabah had the right to refuse admission to its state except for, as examples, certain category of persons, like judges, civil servants and ministers. Secondly, any person, including a Malaysian, who is not of Sabah origin is to be regarded as a non-citizen, that is, an alien (s. 66(3). Thirdly, all this came about as a condition for Sabah joining in the formation of Malaysia.

As for the question of whether Parliament had intended an enquiry be conducted before the director complied with the direction of the state authority, the answer is surely no. That requirement of s. 14 had been modified or over-ridden by the right of the state authority to direct the cancellation of the entry permit. No such power was given to the state authority under s. 14 because there was no such entity then and therefore it could not have been intended then that such an entity be subject to the requirement of making enquiry before the cancellation of the Entry Permit. The entity of the state authority is the creation of Part VII of the Act pursuant to the Malaysia Agreement. Part VII is to give effect to the right of the state over immigration matters and contains the all new provision for the state authority to decide to cancel an entry permit and for the director to carry out its decision. There is no provision that the state authority must conduct an enquiry before deciding on cancelling an entry permit before the coming into existence of Part VII and no new provision was made for an enquiry under Part VII. Therefore, it is my view that no inquiry, whether by the director or by the state authority, is intended by Parliament.

If the whole purpose of Part VII was to protect the East Malaysian states over immigration matter, then it is unthinkable that Parliament would intend that those all important matters, in fact, they form one of the bases for Sabah agreeing to the formation of Malaysia, could be whittled away by a construction that allowed a director to defy the direction of the State authority which surely would be the effect if the requirement of an inquiry is imposed. Therefore, to accede to the construction urged by Mr. Shafee would have the effect of making the special provisions of Part VII which gives protection to the East Malaysia states on immigration matters illusory because that construction would result in the state authority not being able to initiate any action to cancel any Entry Permit. As for the answer to the second question, it is clear that Parliament had intended that the director should follow whatever direction given by the state authority under s. 65.

Mr. Shaffee had also argued that the power in s. 65(1) is only the power to concur or to veto as it could not have been the intention of Parliament that the state authority should function like the immigration department in initiating action. I am unable to agree as the words used in the above provisions are clear and unequivocal. If Parliament had intended that the power in s. 65(1) was only the power to concur it would have said so as it did in sub-ss. (2) and (3). The argument that the state authority would function as an immigration department is also unsound because powers of investigation, interrogation, arrest or prosecution as provided in Part I to VI are not necessary for the state authority to give directions under s. 65(1).

Mr. Shafee had relied on *Datuk Syed Kechik v. Government of Malaysia* [1979] 2 MLJ 101 FC to support his contention that the entry permit can only be cancelled under the provisions of s. 14. The relevant facts of that case are these. On 16 June 1967 Datuk Syed Kechik was granted an entry permit to stay permanently in Sabah under s. 10 of the Immigration Ordinance 1959, and on 18 January 1971 he was declared an Anak Negeri that carries with it the right of a native of Sabah. He was later appointed a senator on 29 September 1973 representing Sabah affairs. He had vast business interests in Sabah and had settled down in Sabah. On 14 April 1976 there was a change of government after an election which saw a manifesto of the victorious party incorporating the expulsion of Datuk Syed Kechik as its aim should it win the election. A magazine also carried a story that steps were afoot to expel him from Sabah. On 27 May 1976 Datuk Syed Kechik took out an originating summons seeking a declaration:

> (a) that he is a person belonging to the State of Sabah in accordance with section 66(1)(a) of the Immigration Act, 1959/63, Act 155, read in conjunction with section 71(a) of the Act;

(b) that he is a permanent resident of the State of Sabah within the meaning of section 71(1)(a) of the Act;

(c) that his right to remain in Sabah conferred under section 10 of the Act in the form of an Entry Permit issued to him is still subsisting and that he cannot be deprived of that right by the State or any other authority;

(d) that that Entry Permit conferring permanent resident status on him in Sabah cannot lawfully be cancelled under section 14 of the Act;

Alternatively

(e) that the cancellation of the Entry Permit under the powers if any under section 14 would not affect the status of permanent residence of the applicant in Sabah for the purpose of sections 66(1)(a) and 71(1)(a) of the Act.

They were other uncontroverted affidavit allegations that the Sabah Government had proceeded to cancel timber licences and acquired lands belonging to Datuk Syed Kechik and his companies. The Federal Government resisted the application on the ground that there was no proceeding taken to remove him from Sabah. The trial judge dismissed the application on the ground that it was premature and that there was a machinery provided under the Immigration Act to deal with the matter. The Federal Court held that Datuk Syed Kechik had real fear that he may be expelled from Sabah and that it was desirable for the court to declare whether or not the Federal and State Governments have a right to expel the applicant. The Federal Court granted the declarations sought in prayers (a) and (b) because Datuk Syed Kechik was a native of Sabah and connected with Sabah. As for prayer (c), there was no dispute and it was declared that his right to remain in Sabah granted by the entry permit still subsisted. The Federal Court also held that the entry permit can be cancelled under s. 14. That case dealt with a person who had already been in Sabah for more than two years after obtaining the entry permit and it did not deal with the question of a person who had been granted an entry permit but who had not yet acquired the status of belonging to the State under s. 71(a). In any event that case did not decide that for a cancellation of an entry permit under s. 65, the provisions of s. 14 must be satisfied. It merely says that s. 14 is one provision which can be resorted for cancellation of the entry permit. That case is, therefore, of no help to the applicant's case.

As for the contention that the words "In exercising his powers under Parts I to VI as a special law for an East Malaysian State" in s. 65 would be rendered surplusage if the provisions of s. 14 are not given effect, I am unable to agree because effect were given to those words since those powers had been incorporated, as provided by s. 64(1), "subject to and in accordance with" Chapter VII, that is subject to the right of the State authority to give direction

to the director to cancel an entry permit. There is also disharmony between s. 65 and s. 14 since s. 14 had been brought in line with s. 65, that is s. 14 is to be moulded and read according to the provisions of s. 65 and other provisions of Part VII.

It was further argued that the applicant had a substantive or vested right after he had obtained the entry permit on 27 December 1995 and that he had a legitimate expectation that the director would exercise his discretion under s. 14 according to law. Datuk Foo replied, and I agree, that the entry permit does not confer any permanent right on the applicant until after the expiration of two years from the date of the grant of the entry permit and before that time it was subject to cancellation at any time by the State authority under s. 65. The amendment to s. 65 that was introduced in 1997 did not change the nature of the right acquired by the applicant. It was and still is a right liable to be cancelled under s. 65 without the need to conduct any inquiry by the State authority or the director. Until the applicant had remained for two years and more after the grant of the entry permit, he is still an alien remaining in Sabah with the permission of the State authority with no substantive or vested right.

For the reasons I have stated, I am of the view that there is no question of error of law when the director followed the direction of the State authority to cancel the entry permit.

Whether The Right To Be Heard Has Been Excluded By Secction 59?

The pre-1997 s. 59 says: "No person and no member of a class of persons shall be given an opportunity of being heard before the Minister or the director-general makes any order against him in respect of any matter under this Act or any subsidiary legislation made under this Act." This was amended to in 1997 to include any order of the State authority as well as not requiring the giving of an opportunity to be heard. This is how Mr. Shafee submitted:-

> 42. The Applicant's application is to quash the cancellation and the declaration made by the Respondent. The Applicant is not challenging any order made by the State Authority, who has made no order against the Applicant in any event.
>
> 43. Submit that the exclusion of right to be heard in Section 59 does not apply to the cancellation and declaration made by the Respondent. The matters stated in paragraph 7 (a) to (h) hereof equally applies to Section 59 as it does to Section 59A.
>
> 44. Would the Applicant's livelihood be affected by the cancellation of the entry permit and the making of the declaration? The answer is yes and reference is made to paragraphs 20, 21, 22, 37 read together with

paragraphs 8, 9, 11, 12, 13, 23, 35, 37, 38, 39 and 42 of the Affidavit of the Applicant affirmed on 14th November 1997. The material facts contained therein have not been disputed and are therefore deemed to have been admitted.

45. Submit that since the Respondent's cancellation and declaration affected the Applicant's livelihood, the Applicant was entitled to procedural fairness, which includes the right to be heard and which **is** a fundamental right guaranteed under Articles 5(1) and 8(1) of the Federal Constitution: *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261 (CA). [Note: The Federal Court in *Ng Hock Cheng v. Pengarah Am Penjara & Ors [1997] CLJ JT (19)* (FC) held that the majority decision of the Court of Appeal in *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor* (supra) where the Court of Appeal substituted its own views as to what the appropriate penalty for the employees' misconduct for the view of the particular employer concerned was wrong in law. The Federal Court *expressly* stated that on this narrow point in question, the majority decision of the Court of Appeal cannot stand. The Federal Court did not disturb the other findings of the Court of Appeal in T*an Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor* (supra) .46. In *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor* (supra) the Court of Appeal said, following the Supreme Court's decision in *Dewan Undangan Negeri Kelantan & Anor v. Nordin Bin Salleh & Anor* [1992] 1 MLJ 697:

> When the constitutionality of State action is called into question on the ground that it infringes a fundamental right, the test to be applied whether that action directly affects the fundamental rights guaranteed by the Constitution or that its inevitable consequence on the fundamental rights is such that it make their exercise ineffective...

If Section 59 is said to apply to the decisions of the Respondent. It is submitted that the exclusion of the right to be heard is a unfair procedure and it must be struck down as offending Article 5 (1) read with Article 8 (1) of the Federal Constitution.

47. Since the Respondent had by his decisions to cancel the Applicant's entry permit and to make the declaration deprived the Applicant of his livelihood without affording the Applicant a right to be heard, it is submitted that both his decisions and the procedure (exclusion of right to be heard) must be struck down.

As for the challenge not being against the decision of the state authority, what I said earlier about the challenge being in fact against the decision of the state authority applies as well because the director had no discretion in the matter but to cancel the entry permit as directed by the state authority. Any challenge

to the action of the director would be futile as he was merely acting in a manner stipulated by s. 65. Also, what I said in construing the privative clause as to apply to the act or decision of the director applies here as well with the result that the act or the decision of the director also enjoy the exclusion of the need to hear the applicant.

Mr. Shafee then, by the submission, *supra*, argued that since the appellant's livelihood had been affected by the cancellation of the entry permit he was entitled to procedural fairness which includes the right to be heard and that since s. 59 provides otherwise it must be struck down as offending art. 5(1) read with art. 8(1) of the Federal Constitution, citing *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261. Article 5(1) and 8(1) of the Constitution relied on by learned counsel read:

> Article 5(1) – No person shall be deprived of his life or personal liberty save in accordance with law.
>
> Article 8(1) - All persons are equal before the law and entitled to the equal protection of the law.

A unique feature of Malaysia is the various affirmative actions taken to help the malays and natives (classified as Bumiputras) which in the context of the Constitution may look discriminatory because the malays and natives are given preferential treatment. But our country recognises that unless action is taken to help the malays and natives the freedom talked about in other countries and if implemented in total in our country may lead to much inequalities in terms of enjoying "life" in Malaysia, which includes, as *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan case* held, all facets that are an integral part of life because the malays and natives in many fields cannot compete as equals given the sophistication and entrenchment of the other races in commerce. Looked at in the abstract, every such affirmative action would not pass the equality test laid down by the constitution. But our constitution must be interpreted to take into account and accord the affirmative actions validity. The same approach must also be taken in respect of the protection of the East Malaysian states. West Malaysia is in every aspect much more developed and sophisticated than East Malaysia. This our legislators had recognised by making provisions in the constitution and the various legislation to protect the interests of the East Malaysian states against the citizens from West Malaysia. In a sense, it is discriminatory but it is in accordance with the law. Furthermore, unless the exercise of the right to grant and to cancel an entry permit by a state authority is made unquestionable in a court of law, which Parliament, in my view, had done by enacting the sections in Part VII, the protection afforded to the East Malaysian states would be eroded. That construction accords well with the terms of the Malaysia Agreement (which give Sabah

and Sarawak control over immigration matters) under which Sabah joined to form Malaysia. A construction otherwise would mean re-writing the terms of the Malaysia Agreement against the will of the legislators of Sabah. It is for the legislators to decide whether such protection on immigration matters granted to the East Malaysian states should go, even though they, according to Mr. Shafee, appear draconian, and the court is in no position to do so.

It must be borne in mind that the applicant, according to the Act, is an alien, that is, a non-citizen, in so far as the state of Sabah is concerned. When he was granted the entry permit there was in place the law that it can be cancelled at anytime by the state authority and the grant of that entry permit was subject to that provision of the law which allows for cancellation. Therefore, if a cancellation does ensue it is done in accordance with the law and it is, in my view, not in violation of either arts. 5(1) or 8(1) of the constitution. Therefore, there is no question of s. 59 being in violation of art. 5(1) or 8(1) of the Constitution.

The case of *Berthelsen v. Director General of Immigration Malaysia & Ors* [1987] 1 MLJ 134 SC was cited when Mr. Shafee submitted that the Applicant ought to have been given an opportunity to be heard. The facts of that case are these. An American journalist was on 2 November 1984 granted an employment pass valid for two years. With about two more months to go, his employment pass was on 26 September 1986 cancelled with immediate effect. The Supreme Court held that the journalist should have been afforded an opportunity to be heard before the cancellation of his pass. But Parliament had reacted after that case to take away the right to be heard by enacting s. 59. Therefore, the rules of natural justice do not apply to the instant case. I turn now to the final point.

Whether Reasons Must Be Given For The Cancellation?

Mr. Shafee submitted that because no reasons were given for the cancellation the decision to cancel must be irrational and the court ought to proceed to consider the materiality or relevance of the failure to provide reasons. Leaned counsel cited *Minister of Human Resources & Ors v. National Union of Hotel, Bar and Restaurant Workers, Semenanjung Malaysia and Anor Appeal* [1997] 3 MLJ 377 CA. The facts of that case are totally different from the present and the subject matter there concerns the Trade Union Regulations 1959. Factually, it is of no help to the applicant's case. As for the cited statement of law, it is also of no help. The court of appeal there held that the absence of reasons for a decision where there was no duty to give them could not of itself provide any support for the suggested irrationality of the decision.

It was also submitted that the present case is not one which involves public policy, national interest, public safety or national security and the court is therefore, submitted learned counsel, entitled to carry out an objective examination of the factual matrix presented to it to ascertain whether a reasonable tribunal similarly circumstanced would have come to the decision as the director did, citing in support *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147 FC, *Kumpulan Perangsang Selangor Bhd v. Zaid bin Hj Mohd Noh* [1997] 1 MLJ 789 SC and *Harris Solid State (M) Sdn Bhd & Ors v Bruno Gentil s/o Pereira & Ors* [1996] 3 MLJ 489 CA. None of those cases are concerned with the right of the East Malaysian states over immigration matters and the right of the executive, that is the State authority, to cancel an entry permit. Therefore they cannot be relied on for deciding the questions herein. As for the question of public policy I am unable to agree that this case is not concerned with it. It is very much so because it involves the manner in which a state executive or the state authority goes about overseeing immigration matters. It is unthinkable for the court to venture into making decision as to when and whom should be issued an entry permit and as to when and why an entry permit should be cancelled. Those are surely matters of policy which are best left to the executive. Furthermore, since the director must and had acted in compliance with the direction of the state authority as required by s. 65, there is no question of giving any reason because he has no choice of action and it should be apparent to the applicant that the director had acted under direction. Also, by virtue of ss. 59 and 59A, the director is not obliged to give any reasons.

Conclusions

For the reasons given, I dismiss the motion with costs to the director and the State authority.